IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
ROBERT H. WENDT,	)	**Supreme Court #SC86642**
	)	
Respondent.	)	

INFORMANT'S BRIEF

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

SHARON K. WEEDIN #30526
STAFF COUNSEL
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATEMENT OF JURISDICTION

Jurisdiction over attorney discipline matters is established by Article 5, Section 5 of the Missouri Constitution, Supreme Court Rule 5, this Court's common law, and Section 484.040 RSMo 2000.

STATEMENT OF FACTS

Disciplinary History

Pre-Disbarment

Robert H. Wendt was licensed to practice law in Missouri in 1967. In December of 1976, the Missouri Supreme Court publicly reprimanded Mr. Wendt for violating DR 7-102(A)(1, 4, 5).[1] Mr. Wendt was reprimanded for failing to return $3,500.00 to a client's mother. Mr. Wendt had given the mother a receipt stating that the money was received for securing bail for the woman's son, and "[f]ailing such purpose, said money will be returned." When bail could not be obtained, Respondent Wendt refused to refund the money, ostensibly because the client owed Respondent money for attorney fees. After complaint was made against Respondent, he met with the mother and returned

[1] DR 7-102. Representing a Client Within the Bounds of the Law

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

. . .

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

$2,500.00 to her, retaining $1,000.00 to apply toward the outstanding fee bill, with the mother's approval. *In re Wendt*, 544 S.W.2d 3 (Mo. banc 1976). **App. 2-4**.

Surrender and Disbarment

On January 5, 1981, Mr. Wendt applied to surrender his law license. **App. 5-6**. At the time the application was filed, the Advisory Committee[2] had, after investigation and formal hearing, found probable cause of professional misconduct on nine separate counts then pending against Mr. Wendt. **App. 7**. The Court accepted the surrender and disbarred Mr. Wendt in an order dated March 9, 1981. **App. 8**.

Reinstatement Proceeding

On September 20, 1988, Respondent Wendt applied for reinstatement. **App. 9-10**. The subsequent reinstatement investigation by the Advisory Committee included a two day hearing, conducted on March 2 and 3, 1989, as well as the production of information by Mr. Wendt in response to a reinstatement questionnaire. The investigation revealed that Mr. Wendt had been prosecuted in 1982 (subsequent to his disbarment) for the federal crime of conspiracy to assist a prisoner escape from jail. The conduct underlying the conviction occurred from late January of 1981 through February 18, 1981 (after the application to surrender had been filed, but before the Court ordered disbarment). **App.**

[2] Prior to July 1, 1991, the General Chairman of the Bar Committees had authority to assign cases to the Advisory Committee for investigation under Rule 5. See, e.g., Missouri Rules of Court, Rules 5.01, 5.07 (1988).

195. Mr. Wendt was convicted by a jury and served four and a half months in federal prison. **App. 92**. He was released from prison in July of 1983. **App. 92**.

The reinstatement investigation showed that Respondent Wendt is an alcoholic. **App. 61**. Mr. Wendt did not acknowledge his drinking problem or seek treatment for alcoholism until October of 1983, when he started attending Alcoholics Anonymous meetings. **App. 94-95**. When Mr. Wendt applied for reinstatement in 1988, he had been sober since October of 1983. **App. 85, 187**. He had been actively involved in Alcoholics Anonymous since October of 1983. **App. 187**.

Seven witnesses, including a state appellate judge, a medical doctor specializing in chemical dependency, and five lawyers, testified on Mr. Wendt's behalf at the reinstatement hearing. The physician attributed Mr. Wendt's misconduct, which included the client complaints from the 1970s through the criminal conduct for which he was prosecuted in the early 1980s, to the disease of alcoholism and not to any sociopathic personality disorder. **App. 60-67**.

In the course of his testimony at the reinstatement hearing, Mr. Wendt admitted misconduct in the nine complaint matters that had been pending against him at the time he applied to surrender his license in early 1981. **App. 114-118**. Most of the complaints involved taking fees from clients for whom he subsequently performed little or no services.

The Advisory Committee reported to the Missouri Supreme Court in April of 1989 that it was split on the question of whether Mr. Wendt should be reinstated and could

therefore make no recommendation to the Court. **App. 206-208**. On May 16, 1989, the Court readmitted Respondent Wendt on a three year probationary basis. **App. 209-210**.

Post Reinstatement

A regional disciplinary committee issued Mr. Wendt an admonition in February of 1994 for violation of Rule 4-4.2, the Rule prohibiting contact with represented parties or their representatives. The conduct underlying the admonition occurred on June 8, 1993, when Mr. Wendt questioned representatives of the state Highway and Transportation Commission at a public hearing without disclosing his relationship to a particular family (who he presumably was representing in a matter adverse to the Commission). **App. 211-212**.

In February of 1999, a regional disciplinary committee issued an admonition to Mr. Wendt for violation of Rule 4-1.3 in that Respondent Wendt failed to appear for a pre-trial conference on behalf of a client, failed to give advance notice to the court of his inability to appear, and failed to advise the client of the court's subsequent dismissal of the client's case. **App. 213-214**.

Case Sub Judice

Procedural History

In September of 2002, the Office of Chief Disciplinary Counsel received a complaint against Mr. Wendt arising from the conclusion by the Missouri Supreme Court that Mr. Wendt rendered ineffective assistance of counsel representing the defendant at

trial in *Knese v. State of Missouri*, 85 S.W.3d 628 (Mo. banc 2002). The jury gave its verdict on June 16, 1997. A complaint file was opened in September of 2002 and referred to a regional disciplinary committee in St. Louis. After investigation, the committee voted unanimously in September of 2003 to close the complaint file on a finding of no probable cause of professional misconduct. **App. 215**.

On November 5, 2003, the complainant requested review of the committee's decision pursuant to Rule 5.12. By letter dated October 19, 2004, the Advisory Committee referred the complaint to the Office of Chief Disciplinary Counsel for further investigation. **App. 216**.

Mr. Wendt was advised by letter dated November 10, 2004, that OCDC had concluded that the conduct described in *Knese v. State of Missouri* was in violation of several Rules of Professional Conduct. **App. 217-218**. After reviewing Mr. Wendt's explanation for the misconduct, **App. 219-221**, and the receipt of several letters supporting Mr. Wendt, **App. 222-225**, staff counsel drafted a proposed stipulation for resolution of the case by recommending to the Court that it issue a public reprimand to Mr. Wendt. The joint stipulation and recommendation for a public reprimand was filed with the Court on March 2, 2005. The Court activated a briefing schedule on April 5, 2005.

Stipulated Facts

The facts stipulated to in the joint stipulation are set forth below.

Case No. 02-0486-XI

In or about January 1997, Respondent undertook the representation of Randall Bernard Knese who, in March 1996, had been charged with Murder 1st degree and attempted forcible rape in that matter entitled *State v. Randall Bernard Knese*, 11th Judicial Circuit Court, and Case No. 11R019600770-01. At the time Respondent undertook the Knese representation, he had not handled a death penalty matter for over fifteen years.

On or about June 16, 1997, Knese was found guilty of both charges and on or about August 8, 1997, the death penalty was ordered on the first degree murder charge.

On or about August 12, 1997, Knese filed a direct appeal to the Supreme Court. Thereafter, on March 15, 1999, the Court affirmed the judgment.

On or about September 20, 1999, in that matter entitled *Randall B. Knese v. State of Missouri*, 11th Judicial Circuit, Case No. 11V019903822, Knese filed a motion for post conviction relief pursuant to rule 29.15, Missouri Court Rules.

On or about June 11, 2001, Knese's motion under Rule 29.15 of the Missouri Court Rules was denied.

On or about July 19, 2001, a Notice of Appeal was filed on the denial of his motion pursuant to Rule 29.15 with the Supreme Court of

Missouri. The basis of the appeal was that Respondent did not strike two jurors as biased and unqualified. On October 22, 2002, the Supreme Court reversed the judgment as to the penalty phase and the case was remanded. The factual findings by the Court were that Respondent failed to review juror questionnaires which he received on the morning of trial or complete initial inquiries to determine whether the jurors were qualified with the result that two jurors were seated whose questionnaires suggested they would automatically impose the death penalty after a murder conviction. The Court found that at a minimum Respondent should have read the questionnaires and voir dired to determine whether the two could serve as jurors. His failure to do so was ineffective assistance of counsel warranting the reversal and remand. A copy of the October 22, 2002 decision of the Supreme Court is attached hereto and marked as Exhibit A.

Case No. 05-0069

As of July 1, 2002, Respondent was delinquent in his compliance with rule 15(a) of the Missouri Court Rules for the 1998-1999, 1999-2000, 2000-2001 and 2001-2002 reporting periods. Respondent eventually met his requirement for the 1998-1999 reporting period on November 1, 2002. He met his requirement for the 1999-2000 reporting period on November 5, 2002. He met his requirement for the 2000-2001 reporting period on November 1, 2002 and his requirement for the 2001-2002 reporting period on December 12, 2002.

Between July 1, 1999 and December 12, 2002, Respondent continued to practice law in the State of Missouri and/or hold himself out as entitled to practice.

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE RESPONDENT FAILED TO PROTECT HIS CLIENT'S RIGHT TO ADEQUATE VOIR DIRE IN THAT HE NEGLIGENTLY FAILED TO REVIEW VENIRE QUESTIONNAIRES ON THE MORNING OF TRIAL.

In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (banc 1993)

State ex rel. Picerno v. Mauer, 920 S.W.2d 904 (Mo. App. 1996)

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

Rule 4-1.1

Rule 4-1.3

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT IN ACCORDANCE WITH THE JOINT RECOMMENDATION OF THE PARTIES BECAUSE PUBLIC REPRIMAND IS AN APPROPRIATE SANCTION FOR NEGLIGENT VIOLATION OF THE DUTIES OF COMPETENCE AND DILIGENCE IN THAT THE MISCONDUCT OCCURRED IN 1997 AND HAS NOT BEEN REPEATED AND RESPONDENT HAS OPENLY ACKNOWLEDGED HIS WRONGDOING.

ABA Standards for Imposing Lawyer Sanctions (1991 ed.)

ARGUMENT

I.

THE SUPREME COURT SHOULD DISCIPLINE RESPONDENT BECAUSE RESPONDENT FAILED TO PROTECT HIS CLIENT'S RIGHT TO ADEQUATE VOIR DIRE IN THAT HE NEGLIGENTLY FAILED TO REVIEW VENIRE QUESTIONNAIRES ON THE MORNING OF TRIAL.

The Court's opinion in *Knese v. State of Missouri*, 85 S.W.3d 632 (Mo. banc 2002) is final on the question whether the conduct at issue was ineffective representation and prejudicial to the client under the *Strickland v. Washington*, 466 U.S. 668 (1984), standard. Whether the conduct violated the Rules of Professional Conduct is a distinct determination, but it is clear that the facts Respondent has stipulated to are a sufficient basis for this Court to conclude that the competence and diligence rules, 4-1.1 and 4-1.3, were violated by Mr. Wendt's mishandling of the venire questionnaires.

It should be noted that the competence and diligence rules, unlike many other Rules of Professional Conduct, do not require an intent by the lawyer to commit misconduct. See *In re Wolfram*, 174 Ariz. 49, 847 P.2d 94 (banc 1993) (competence, diligence, and communication rules do not require that intentional misconduct be shown). Lack of competence and failure to be diligent can come about as a consequence of a lawyer's negligence. The ABA Standards for Imposing Lawyer Sanctions (1991 ed.), as a general proposition, anticipate a lower level of sanction for cases presenting a less

culpable mental state. Absent other circumstances, i.e., the presence of specified mitigating and aggravating factors, the Standards typically recommend admonition or reprimand in cases of negligent violation of a rule.

It was established in the course of Mr. Knese's post-conviction relief case that two members of the venire panel assembled for his capital murder trial had professed, on their questionnaires, strong opinions in favor of the death penalty and against criminals. In the course of the post-conviction relief proceeding, Mr. Wendt acknowledged not reviewing the questionnaire answers of those two particular veniremen, both of whom ended up on the jury. Mr. Wendt candidly admitted that his failure to review the answers to those questionnaires was an "egregious mistake." He admitted that his failure to review the answers to the questionnaires, which led to his failure to question and strike the two potential jurors, was an "egregious error," by him, "especially in a case like this." *Knese v. State of Missouri*, 85 S.W.3d 628, 632 (Mo. banc 2002).

Competent representation requires adequate preparation. The degree of preparation required to carry the lawyer over the threshold of ethical competency is "determined in part by what is at stake." Comment, Supreme Court Rule 4-1.1. It is difficult to conceive of a legal case in which more is at stake than a capital murder trial, a fact that Mr. Wendt's own comments acknowledge.

Mr. Wendt's failure to review the questionnaires and question the two veniremen was also a violation of the diligence rule, 4-1.3. The duty of diligence encompasses the duty to protect a client's interests by taking specific action. In this case, Respondent's

lack of diligence, i.e., his failure to review the questionnaires and interrogate the questionable veniremen, denied the client's right to a fair and impartial jury.

The circumstance that the questionnaires at issue were, according to the stipulated facts, belatedly provided to Mr. Wendt on the morning voir dire was to proceed tends to lessen Respondent's culpability for failing to use them to protect his client's interests. That circumstance does not, however, negate the violation itself. A lawyer finding himself in the seemingly unreconcilable position of fulfilling his ethical duties to a client and complying with the time constraints imposed by a court and litigation should, at the least, inform the court of the dilemma and make a record. Cf. *State ex rel. Picerno v. Mauer*, 920 S.W.2d 904, 911-912 (Mo. App. 1996) (lawyer satisfied constraints of rules of professional conduct when he emphatically informed the court of how ill-prepared he was and sought a continuance). There is no evidence that any such action by Mr. Wendt occurred.

ARGUMENT

II.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT IN ACCORDANCE WITH THE JOINT RECOMMENDATION OF THE PARTIES BECAUSE PUBLIC REPRIMAND IS AN APPROPRIATE SANCTION FOR NEGLIGENT VIOLATION OF THE DUTIES OF COMPETENCE AND DILIGENCE IN THAT THE MISCONDUCT OCCURRED IN 1997 AND HAS NOT BEEN REPEATED AND RESPONDENT HAS OPENLY ACKNOWLEDGED HIS WRONGDOING.

The sanction jointly recommended by the parties to the Court is a public reprimand. The sanctions analysis underlying that recommendation follows. The more serious[3] of the two instances of misconduct[4] covered by the stipulation is the one

[3] The Standards framework anticipates that the ultimate sanction imposed "be consistent with the sanction for the most serious instance of misconduct among a number of violations." ABA Standards for Imposing Lawyer Sanctions, at 6.

[4] It has been stipulated that, as of November 1, 2002, Respondent was out of compliance with the CLE reporting rule for the four preceding reporting years, but that by the end of December, 2002, he had filed the reports necessary to bring himself into compliance. Because Mr. Wendt practiced law in those years he was not compliant, he was in

involving the venire questionnaires. Mr. Wendt violated duties owed to a client, the most important of a lawyer's obligations. ABA Standards for Imposing Lawyer Sanctions, at p. 5 (1991 ed.). And, the potential for injury to the client is extreme – denial of the client's Constitutional right to a fair and impartial jury. Still, the remaining pieces of the sanctions analysis puzzle support the jointly recommended sanction, that of a public reprimand.

There was no evidence from which to infer any mental state for Mr. Wendt's pre-trial lapse other than negligence – inadvertence owing to the stress of last minute trial preparation. When the following aggravating and mitigating factors are considered, public reprimand, per either Standard Rule 4.43,[5] or Standard Rule 4.53(b), is applicable. In aggravation, there is, of course, Mr. Wendt's disbarment from 1981 to 1989. The reinstatement proceeding, however, produced a good deal of evidence attributing Mr. Wendt's misconduct in the 1970s and early 1980s to unacknowledged and untreated

---

violation of Rule 4-5.5(c). That said, OCDC recognizes that Mr. Wendt brought himself into compliance without intervention from OCDC.

[5] Standard Rule 4.43 reads: "Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client: Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client."

alcoholism. The Office of Chief Disciplinary Counsel has no reason to believe Mr. Wendt has relapsed; indeed, the director of Missouri's Lawyer's Assistance Program wrote OCDC a letter in January of this year commending Mr. Wendt's voluntary services to that program over the last 20 years. **App. 225**.

In mitigation, the misconduct at issue occurred during a trial that took place in mid-1997. No complaint was made to OCDC about the conduct until September of 2002. The disciplinary case itself has taken the long route to the Court – a regional committee had it for a year before voting to close the file, and the Advisory Committee likewise reviewed the file for a year before referring it to OCDC, in October of 2004, for further consideration. See Standard Rule 9.32(i).[6] Significantly, Mr. Wendt has generated no discipline for fact patterns mirroring the 1997 trial incident in the eight years that have intervened. Additionally, Mr. Wendt has freely acknowledged his error, both in the testimony he provided in the Rule 29.15 proceeding and in his dealings with OCDC. See Standard Rule 9.32(e).[7]

---

[6] Standard Rule 9.32 (i) reads: "Factors which may be considered in mitigation. Mitigating factors include:

. . .

(i) delay in disciplinary proceedings."

[7] Standard Rule 9.32(e) reads: "Factors which may be considered in mitigation. Mitigating factors include:

. . .

In accordance with the foregoing analysis, public reprimand is an appropriate sanction to address the concerns of protecting the public and preserving the integrity of the legal profession.

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings."

CONCLUSION

Mr. Wendt has stipulated to facts from which the Court can conclude he has violated Rules 4-5.5(c) (practiced law while non-CLE compliant), 4-1.1 (competence), and 4-1.3 (diligence). In view of the evidence that Mr. Wendt's violation of the diligence and competence rules was negligent, and the strong mitigating factors present, public reprimand is an appropriate sanction to address the wrongdoing.

Respectfully submitted,

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

By: _____

Sharon K. Weedin #30526
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2005, two copies of Informant's Brief and a diskette containing the brief in Microsoft Word format have been sent via First Class mail to:

Donald L. Wolff
8019 Forsyth
Clayton, MO 63105-1706

Attorney for Respondent

_____
Sharon K. Weedin

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b);

3. Contains 3,187 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and

4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

_____
Sharon K. Weedin

TABLE OF CONTENTS

8